

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES TERRY DAVIS**

Claimant

VS.

**HAY & FORAGE INDUSTRIES**

Respondent

Self-Insured

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Docket No. 233,211

**ORDER**

Claimant appealed the preliminary hearing Order dated May 15, 1998, entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

The Administrative Law Judge (ALJ) denied claimant's request for preliminary benefits finding claimant failed to sustain his burden of proof of injury by accident arising out of and in the course of his employment with respondent. That is the sole issue for Appeals Board review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented and for preliminary hearing purposes, the Appeals Board concludes for the reasons stated below that the ALJ's Order should be affirmed.

**Findings of Fact**

(1) In his Form E-1 Application for Hearing claimant alleged an accident date of March 21, 1998, and each and every working day thereafter. That claim was orally amended at the preliminary hearing to allege a series of accidents with an ending date of March 21, 1998.

(2) Claimant has worked as a machinist for respondent since November 1997. Claimant described his job duties as requiring that he crouch, kneel, and stand for eight to ten hours a day on a concrete floor.

(3) Claimant testified that his left knee problems began in March of 1998. Some nights after work his knee would swell up. He would put ice on it and the next day it would be better.

(4) Claimant testified that on Saturday, March 21, 1998, he worked an 8-hour shift. Claimant noticed some knee pain and swelling at work and that night it "ballooned up completely." He again treated it with ice and anti-inflammatories but the pain and swelling did not go away. On Monday, March 23, 1998, the knee was getting worse. Claimant said he contacted someone named Mary at medical security but was told he needed to obtain his own medical treatment because if he could not remember a specific injury then it was not a workers compensation matter.

(5) The next day, Tuesday, March 24, 1998, claimant saw his family physician, Dr. Patrick J. Lomasney, who in turn referred him to orthopedic surgeon Bradley W. Bruner, M.D.

(6) The following day, March 25, 1998, claimant went to the Minor Emergency Clinic because Dr. Lomasney was on vacation. He was given a prescription for anti-inflammatories and pain medication. He was also given work restrictions. Claimant was advised that respondent did not have any work available within those restrictions. He has not returned to work since March 21, 1998.

(7) He saw Dr. Bruner on April 2, 1998. Dr. Bruner took x-rays of claimant's knee and compared them to x-rays taken after his prior surgeries. Dr. Bruner believed that claimant had most likely sustained an anterior crucial ligament (ACL) tear and should have experienced a sudden onset of pain. Claimant, however, denies experiencing any sudden onset of pain. Dr. Bruner recommended surgery which was scheduled but postponed due to the lack of an authorization from the respondent.

(8) Claimant has had prior left knee problems and had surgeries on the left knee in 1991. Claimant denied receiving any treatment for his knee from the time he was released from his 1991 knee surgeries until March 24, 1998. Claimant testified that his left knee has been quite improved since those surgeries and, in fact, he was even able to play rugby. Claimant testified that he retired from rugby in February of 1997 but continued to referee rugby in the Fall of 1997. In November 1997 claimant sustained a back injury. Claimant denied that either his back or his knee was bothering him prior to the alleged accident at work in March of 1998 which is the subject of this claim. Claimant also denied engaging in any extra-curricular activities since his accident date that would have worsened his condition.

(9) On November 14, 1997, claimant completed a medical questionnaire for respondent wherein he stated that he "[o]ccasionally has back ache after playing rugby. Never required medical treatment." Dr. Lomasney's records, however, reveal that claimant was seen on November 3, 1997, with complaints of back pain after playing rugby two days before. On cross-examination, after being shown those records, claimant admitted that he was a player and not a referee at that time. As a result of that back injury, claimant received physical therapy and was even off work for a time. On cross-examination claimant also admitted that his representations to respondent on the medical questionnaire were not true.

(10) When claimant was examined by Dr. Lomasney on March 24, 1998, he gave the doctor a history of slowly progressing difficulties with his knee. Claimant stated that he was on his feet 10 hours a day at work on concrete and that he also did a lot of running as a rugby referee. Dr. Lomasney reported finding no swelling, effusion, or laxity in the knee. Dr. Lomasney suspected recurrent meniscal difficulties because of claimant's previous repair. Dr. Lomasney instructed claimant to ice his knee every evening and to not do any running until his evaluation with the orthopedic surgeon was completed. He did not impose any work restrictions at that time. Later, after claimant was told by respondent that he needed to return to work unless he had restrictions, claimant obtained restrictions from the Minor Emergency Clinic. On cross-examination it was revealed that claimant did not actually see a doctor and was not examined at the Minor Emergency Clinic. Instead, a nurse simply handed him an off-work slip that had already been made out.

(11) Neither Dr. Lomasney nor Dr. Bruner took claimant off work. In fact, following his examination of claimant, Dr. Bruner gave claimant a return-to-work release with restrictions against lifting over 20 to 25 pounds and no prolonged standing or walking, no kneeling, no squatting, no climbing ladders and limited stair climbing. Claimant did not inform his employer, however, that he had been released to return to work with restrictions by Dr. Bruner.

(12) Claimant's wife later sent respondent's return-to-work form to Dr. Bruner to complete with instructions to return a copy of the completed form to her which she never received. Claimant testified he believed Dr. Bruner had sent the completed form directly to respondent. Claimant further testified that he had contacted respondent on a weekly basis to inform them that his restrictions had not changed and inquire if they had any work available for him within those restrictions. No accommodated work has ever been offered to claimant.

(13) The record contains several inconsistencies and/or false statements. For example, the employer's records from the first telephone call from claimant after his initial visit to Dr. Lomasney reflect that claimant said the doctor had drained his knee. Claimant denied that when he called in to report his work status to his employer that he informed them that Dr. Lomasney had drained his knee. Upon cross-examination claimant agreed that Dr. Lomasney did not drain his knee. Claimant said he told his employer that he may have to have his knee drained, not that Dr. Lomasney drained his knee when he saw him on the 24th of March. But claimant's April 3, 1998, letter to respondent also stated that Dr. Lomasney drained his knee. Claimant attempted to explain this inconsistency by saying his wife typed the letter.

(14) Claimant testified that he last refereed rugby in November of 1997 but then admitted that he refereed in February of 1998. Claimant was also less than forthcoming about whether he actually played rugby in the Fall of 1997 or only refereed. He finally admitted playing rugby in November 1997 as a non-roster player. On questioning from the Court, claimant said that he jogged right up until the time of his March 21, 1998, injury.

(15) Claimant's supervisor, Lonnie Brown, testified that all the machines have rubber floormats so the operators do not need to stand directly on the concrete. Mr. Brown also

testified that there was work available within the restrictions given by Dr. Bruner but that he had never seen those restrictions and had never been contacted with regard to an attempt to place claimant within those restrictions. But he also confirmed that he had no work available within the restrictions claimant was initially given by the Minor Emergency Clinic because those prohibited any standing. Mr. Brown admitted on cross-examination, however, that the deburrer job is sedentary and would have met claimant's initial work restrictions, but that position was never offered to claimant.

#### Conclusions of Law

Both Dr. Lomasney and Dr. Bruner attributed claimant's knee injury, at least in part, to his employment based upon the histories they were given by claimant of prolonged standing on concrete. Neither doctor was advised that there were rubber mats to stand on. Dr. Bruner was not given the history of a gradual onset, which was apparently Dr. Lomasney's understanding. The ALJ found claimant had not met his burden to prove injury by accident arising out of and in the course of his employment with respondent. The transcript of proceedings shows this was based primarily upon the claimant's credibility. Generally, the Appeals Board gives deference to the ALJ's determination of credibility where the Judge had the opportunity to personally observe the witnesses testify. In this case, there are several inconsistencies in the record which do raise questions concerning the claimant's credibility. Also, the descriptions claimant gave to the physicians as to his onset of symptoms, his activities, and his job duties are important to their determination of causation. Because of the inconsistencies in the record and given the ALJ's unique opportunity to observe the in-person testimony, the Appeals Board finds that the Order denying benefits should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated May 15, 1998, entered by Administrative Law Judge Bruce E. Moore should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

c: David H. Farris, Wichita, KS  
Larry D. Shoaf, Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director